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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK McCORMICK,
Warden of the Montana State Prison,

Petitioner,

v.

BERNARD J. FITZPATRICK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Were there any facts properly found by a state court to which the Court of Appeals should have paid deference in resolving the legal question of whether respondent's trial attorney labored under a conflict of interest?

2. May petitioner raise for the first time in the petition for certiorari the question of whether respondent's double jeopardy claim is barred under the retroactivity principles announced in Teague v. Lane, 489 U.S. ___, 109 S. Ct. 1060 (1989)? And, if so, was the Court of Appeals precluded from addressing respondent's double jeopardy claim because of nonretroactivity principles?

3. Did the Court of Appeals correctly decide that the acquittal of the death sentence in respondent's first trial for the crime of deliberate homicide barred imposition of the death sentence for that same offense upon retrial?

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II. THE COURT OF APPEALS' DOUBLE JEOPARDY DECISION IS INCONTESTABLY CORRECT, AND PRESENTS NO GOOD OCCASION TO EXPAND THE NONRETROACTIVITY PRINCIPLES OF TEAGUE V. LANE, 109 S. Ct. 1060 (1989). 10

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BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent Bernard J. Fitzpatrick respectfully submits that the Court should not issue a writ of certiorari in this case because petitioner has not disclosed any "special and important reasons" for reviewing the unanimous panel decision below. Sup. Ct. R. 17.

STATEMENT OF THE CASE

The Court of Appeal's opinion, Fitzpatrick v. McCormick, 869 F.2d 1247, 1248-51 (9th Cir. 1989), adequately recounts the facts surrounding respondent's trials and post-conviction proceedings. Respondent, however, is compelled to disagree with petitioner's Statement of the Case in several respects as it relates to the Questions Presented. Clarification of the record and additional facts are discussed in the Reasons for Denying the Writ, infra.[1]

[1] One statement made by petitioner unrelated to the Questions Presented requires some discussion here. On page 9 of the Petition, petitioner implies that respondent somehow waived

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' CONCLUSION THAT RESPONDENT'S TRIAL ATTORNEY ACTIVELY REPRESENTED CONFLICTING INTERESTS THAT ADVERSELY AFFECTED HIS PERFORMANCE DID NOT VIOLATE 28 U.S.C. § 2254(d).

The Court of Appeals concluded that respondent was denied his constitutional right to effective representation because his trial attorney represented conflicting interests caused by his

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the conflict of interest under which his attorney labored. The Court of Appeals below read otherwise, and no court reviewing the record has ever concluded that Bernard Fitzpatrick knew of Mr. Adams' conflict of interest caused by the confidential information or its effect on the trial strategy. Moreover, no court could have made such a conclusion because Mr. Fitzpatrick was unaware that Mr. Adams would refuse to present evidence pointing to Paul Bad Horse as the true culprit. See Petition App. 156-57, 169 (Mr. Adams' continues to refuse to disclose information). Mr. Adams did not tell Mr. Fitzpatrick of the conflict and made his decision not to implicate Mr. Bad Horse without Mr. Fitzpatrick's input. Deposition of John Adams, at 42, reprinted in Respondent's Appendix 1 (Adams did not believe there was a conflict and never discussed any conflict with Bernard Fitzpatrick).

The prosecutor's pretrial request for the trial court to determine whether Mr. Fitzpatrick was "satisfied and happy with the representation of Mr. John Adams," Petition App. 180, which petitioner emphasizes, Petition 9, said nothing about a potential conflict of interest. Nor does the record indicate it was served on Mr. Fitzpatrick. In any event, at the January 16, 1978 hearing on respondent's motion to remove Mr. Adams, the possibility of a conflict of interest was not discussed. Post-Conviction Hearing Transcript, at 1336-38, see Fitzpatrick v. State, No. 1107-C, slip op. (Mont. Dist. Ct. Sept. 1, 1982), reprinted in, Petition App. 187, 189-90. The trial court said the hearing was to discuss whether Mr. Adams should be removed because he "has so much to do that he is not able to adequately take care of [Mr. Fitzpatrick's] . . . case." Petition App. 189. Mr. Fitzpatrick indicated that was his understanding, stating that Mr. Adams "assures me that his case load isn't too heavy to handle this case . . . ." Petition App. 190. Moreover, the trial court assured Mr. Fitzpatrick that Mr. Adams' ability to represent his interests was enhanced by the fact that "he has already been through this case once and so he's familiar with the details so he can be of more help to you quicker and easier than anybody else I could find." Petition App. 190.

In short, there is no evidence that Bernard Fitzpatrick knew of the conflict and voluntarily and intelligently waived his right to conflict-free representation. As the Court of Appeals noted, respondent's "mere knowledge that Adams represented Bad Horse at the first trial is [not] a basis for waiver of any conflict of interest objections at his second trial." Fitzpatrick v. McCormick, 869 F.2d at 1254 n.3.

prior representation of Paul Bad Horse and that those interests adversely affected his later performance as respondent's attorney.[2] Petitioner does not address the merits of the court's conclusion, make any suggestion that the court's opinion raises any important federal issue, or indicate that the court's decision creates a conflict in the circuits. Indeed, petitioner does not even claim any error of law committed by the Court of Appeals. Rather, petitioner's sole argument is that somehow the Court of Appeals failed to give adequate deference to the state court findings of fact as required by 28 U.S.C. § 2254(d).[3]

Even if it were a reason to grant certiorari, petitioner's attempt to portray the Court of Appeal's decision as one of insufficient deference to state factfinding would be unavailing. The question of whether a conflict of interest violates the Sixth Amendment right to counsel is a mixed question of law and fact. The Court of Appeals' decision was entirely consistent with any findings of historical facts made by the state courts. The inconsistencies to which petitioner alludes as evidence of the Court of Appeals' failure to pay proper deference to state fact-finding simply reflect different constitutional inferences from the same set of facts.

Section 2254(d) of Title 28 creates a rebuttable presumption of correctness of a determination made by a state court, "after a

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[2] It is settled beyond debate that an attorney owes the utmost loyalty to his or her client, and a failure to fulfill this duty by representing conflicting interests that interfere with a criminal defendant's representation violates the U.S. Constitution. See, e.g., Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). An attorney violates this duty of loyalty to his or her client "when counsel is burdened by an actual conflict of interest." Strickland v. Washington, 466 U.S. 668, 692 (1984).

[3] Petitioner raises this argument for the first time in its Petition to this Court. Petitioner did not contend below that there was any state court fact-finding which required resolution of the conflict of interest issue in the state's favor. Indeed, petitioner's brief in the Court of Appeals does not even cite 28 U.S.C. § 2254(d).

hearing on the merits of a factual issue." The presumption applies only to determinations of "'basic, primary, or historical fac(t).'" Strickland v. Washington, 466 U.S. 668, 698 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963)). When the issue includes a mixed question of law and fact or question of law, section 2254(d) does not require giving a presumption to the state court's findings. See, e.g., Miller v. Fenton, 474 U.S. 104, 117 (1985).

This Court has consistently recognized that conflict of interest determinations -- whether an attorney represents conflicting interests and whether those conflicts adversely affected the attorney's representation -- are mixed questions of law and fact, and not questions of fact. E.g., Cuyler v. Sullivan, 446 U.S. 335, 342 (1980). Thus, section 2254(d) does not accord any presumption of correctness to a state court's conclusion that an attorney was not laboring under a conflict of interest:

> Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), . . . both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland v. Washington, 466 U.S. at 698.

There was no real question about the "basic, primary, or historical facts" underlying this issue in this case. Mr. Adams represented Paul Bad Horse when he originally was tried in 1975 with Bernard Fitzpatrick, Gary Radi, and Travis Holliday.* Mr. Adams was a personal friend of Mr. Bad Horse and his family before he became involved in this case. See, e.g., Post-

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* The 1975 convictions of respondent and his codefendants were reversed on appeal by the Montana Supreme Court. State v. Fitzpatrick, 569 P.2d 383 (Mont. 1977). Each of the codefendants was retried separately. Paul Bad Horse and Travis Holliday were again convicted of robbery, while Gary Radi -- the person who the prosecution contends assisted Bernard Fitzpatrick in kidnapping and killing Monte Dyckman -- was acquitted on all counts.

Conviction Hearing Transcript, at 437, 439, reprinted in Respondent's Appendix 2-3. Mr. Bad Horse convinced Mr. Adams that he (Bad Horse) was not implicated in the killing. At the state post-conviction hearing, Mr. Adams testified that he became convinced during his representation of Mr. Bad Horse that he "had been in downtown Hardin during the crime" and was not involved in the homicide. Petition, App. 165; see also Petition App. 163. However, when he was questioned as to how he arrived at these conclusions, Mr. Adams refused to answer, because "[t]o answer that question inferredly [sic] would invade attorney-client relations, and rather than inferredly [sic] or otherwise, I will say that I will stand on attorney-client privileges regarding my knowledge or lack of knowledge regarding this case." Petition App. 169; see also Petition App. 156-57. The privilege he was protecting was not Mr. Fitzpatrick's; Mr. Fitzpatrick waived that privilege in the post-conviction proceedings, and each of his attorneys -- including Mr. Adams -- testified that he told them he was not involved in this murder. See, e.g., Petition App. 169.

Thus, despite Bernard Fitzpatrick's protestations of innocence -- to his attorney and from the witness stand -- Mr. Adams plainly believed him guilty and refused to present any defense that implicated Paul Bad Horse. The trial record reveals no instance in which Mr. Adams asserts -- either by implication in questioning or directly in argument -- that Mr. Bad Horse was the culprit, despite the substantial evidence that pointed to such a conclusion. At trial, there was no mention of the statement of Iva Lee Finch, a key prosecution witness, who said that on the night of the killing she overheard Travis Holliday tell Paul Bad Horse "that he shouldn't have done what he did, or hurt this other person," and Paul Bad Horse replied that, "Oh

well. I had to do it." Petition App. 161-62.[5] Mr. Adams refused to use this statement or even to investigate whether Mr. Bad Horse was involved in the killing. Petition App. 163.

Moreover, Mr. Adams refused to use evidence of Paul Bad Horse's involvement that came to light as a result of the prosecution's witnesses. At trial, the prosecution elicited evidence that Paul Bad Horse obtained the knife used to cut the rope that bound the victim, Trial transcript (Tr. trans.), at 153-54, and possessed that weapon when he was arrested on April 6, 1975, Tr. trans. at 48-49, 319-20. Mr. Bad Horse had planned the "Safeway job" months prior to the crime. Tr. trans. at 195. He was familiar with the isolated area where the victim was found. In contrast, Bernard Fitzpatrick was completely ignorant of Hardin and the surrounding areas. Tr. trans. 51-53 (victim's vehicle found in remote area, one that required some knowledge of the terrain), 198 (Mr. Bad Horse familiar with the location of the victim's car), 266 (Mr. Fitzpatrick and Mr. Radi not familiar with the area). Upon his arrest, Paul Bad Horse immediately arranged with Edwin Bushman to create a false alibi, Tr. trans. at 180, 333, and to remove any traces of incriminating evidence from Mr. Bushman's car, Tr. trans. at 225-27. Ms. Finch heard Mr. Bad Horse and Mr. Holliday discussing a gun, Tr. trans. at 328-29, and even Edwin Bushman testified that Paul Bad Horse had handled the gun seen at Gary Radi's house, Tr. trans. at 204.

In addition to that, the conflict precluded Mr. Adams from even considering putting Mr. Bad Horse on the stand to elicit his testimony about the crime. Nor, as he admitted, could he consider calling Travis Holliday to implicate him along with Bad

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[5] Iva Lee Finch's statement was documented in an interview with the Hardin sheriff's office. Mr. Adams' trial file contained a copy of this statement. Petition App. 158. Although at the post-conviction hearing Mr. Adam did not specifically recall the statement, he did admit that "[i]f it was in the case file, I undoubtedly saw it." Petition App. 158.

Horse. The conflict thus foreclosed exploration of the most likely alternative explanation for Monte Dyckman's death -- that he was killed by these men, and Edwin Bushman, not Bernard Fitzpatrick and Gary Radi. It is far from clear that explanation "would have been a lie" -- another jury apparently accepted it in acquitting Gary Radi of this crime.

Under such circumstances, the Court of Appeals' conclusion that Mr. Adams' possession of confidential information created a conflict of interest was compelled by well-established law.[6]

The state courts rejected respondent's claim, not because of any factual finding, but because they did not recognize the constitutional implications of successive representation and the role that confidential communications can have on subsequent representation. In denying respondent post-conviction relief, the trial court said as much: "As a result of the first trial, Bad Horse had been acquitted of the charges of deliberate homicide and aggravated kidnapping, so that at the time of petitioner's trial in 1978, there was no basis for any possible conflict of interest as to petitioner's position with respect to

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[6] See, e.g., Holloway v. Arkansas, 435 U.S. 475, 490 (1978) ("[I]n a case of joint representation of conflicting interests the evil . . . is what the advocate finds himself compelled to refrain from doing, not only at trial but also as to pretrial plea negotiations and in the sentencing process.") (emphasis in original); Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir.) ("In successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties"); cert. denied, 109 S. Ct. 260 (1988); United States v. Wheat, 813 F.2d 1399, 1402 (9th Cir. 1987) ("The mere possession of a former client's and codefendent's privileged communications poses the precise potential for conflict . . . ."), aff'd, 486 U.S. ___, 108 S. Ct. 1692, 1697, 100 L.Ed.2d 140, 149 (1988) ("we have recognized that multiple representation of criminal defendants engenders special dangers of which a court must be aware"); United States v. Agosto, 675 F.2d 965, 971 (8th Cir.) ("A major course of conflicts in both successive and multiple representation cases is the attorney's receipt of privileged information form a witness or codefendant."), cert. denied, 459 U.S. 834 (1982); United States v. Martinez, 630 F.2d 361, 363 (5th Cir. 1980), cert. denied, 450 U.S. 922 (1981).

such charges." Fitzpatrick v. State, No. 1107-C, slip op. (Mont. Dist. Ct. Sept. 1, 1982), reprinted in Petition App. 187, 222. The Montana Supreme Court rejected the claim by a similar non sequitur: "[A]s a result of the first trial, Bad Horse had been acquitted of the charges of deliberate homicide and aggravated kidnapping. Clearly he cannot be tried again for those same charges in this case. Consequently, we find petitioner's argument totally without merit." Fitzpatrick v. State, 671 P.2d 1, 12 (Mont. 1983), reprinted in Petition App. 226, 251.

Petitioner's statement that "Adams had no reason to protect Bad Horse regarding those charges at Fitzpatrick's second trial," Petition 13, evidences the same misunderstanding of the issue as the state courts had. It also ignores Mr. Adams own testimony about his trial strategy, and his continuing protection of Bad Horse's interests when questioned in this case. Right or wrong, Mr. Adams felt himself unable to implicate Mr. Bad Horse in the crime -- and even today will not disclose the confidential information that shaped his opinion of Paul Bad Horse's involvement.

The Court of Appeals concluded that the conflict adversely affected Mr. Adams' representation of respondent, because his trial strategy was dictated by his belief that Paul Bad Horse was not involved in the killing. The historical facts supporting this conclusion are undisputed by the state courts, and indisputable on this record. Mr. Adams, at the post-conviction hearing, admitted that his belief in Paul Bad Horse's innocence affected his defense of respondent: he refused to present any defense that pointed to Mr. Bad Horse as perpetrator of this crime "for the reason it would have been a lie." Petition App. 163. Mr. Adams' took this position because of his philosophy of criminal defense, which gave controlling importance to his beliefs regarding the client's guilt or innocence in shaping his

approach to a case:

> Attorneys today have the belief that their job is to defend a client. They are to represent a client to the best of their ability, to insure that his rights at every stage of the proceeding are protected. But they should never lose sight of the fact that a court of law is a court where truth is sought and should be brought forward. Answers and questions should not infer incorrect inferences. The attorney is neither honest with himself nor honest with the public nor honest with his profession if he tries to do so. . . . My approach to a problem is, if the client is innocent, I'll go to hell for him, including going to jail, if necessary, to try and protect him. If my client has, for reasons that I won't divulge, left me with the belief that he may be guilty, I will still make the state prove its charge, because that is our constitutional right, that is the system on which this government has been based, and I do my very best under such circumstances to see that he is protected in every stage of the proceeding, by objection, by answer, by argument and by otherwise, and to test to the fullest of my ability the truth and reliability of any statements that are put on the witness stand.

Petition App. 166-67.

Petitioner's final criticism focuses on this statement by the Court of Appeals: "Fitzpatrick's defense was that he did not commit the crimes; rather, Bad Horse, Bushman and Holliday did. Thus, Fitzpatrick's defense theory was in direct conflict with that of Bad Horse." Fitzpatrick v. McCormick, 869 F.2d at 1252.[7] Petitioner apparently sees no conflict between Bad Horse's denial of involvement in the crime, and the presentation of evidence that he committed it. The Court of Appeals can hardly be faulted for failing to read such illogic into the state courts' decisions. In any event, the question is not whether there was a factual conflict between the two suspects' assertions regarding the events, but whether there was a legal conflict between their interests in defending against the charges. That is obviously an

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[7] Petitioner's argument paraphrases the Court of Appeals' statement, inverting its references to Mr. Fitzpatrick's "defense" and his "defense theory." Petition 13. By so doing, it confuses the Court of Appeals' distinction between the defense that would have been recognized and presented by an attorney unfettered by conflicts, and the defense Mr. Adams actually put on at the Fitzpatrick trial.

issue of law, not fact, Cuyler v. Sullivan, 446 U.S. at 342, on which deference to the state courts was neither necessary nor proper.

Petitioner fails to demonstrate any error in the Court of Appeals' decision, or reason to review its judgment.

II.

THE COURT OF APPEALS' DOUBLE JEOPARDY DECISION IS INCONTESTABLY CORRECT, AND PRESENTS NO GOOD OCCASION TO EXPAND THE NONRETROACTIVITY PRINCIPLES OF TEAGUE V. LANE, 109 S. Ct. 1060 (1989).

At Bernard Fitzpatrick's first trial, the trial judge refused to impose a death sentence for the crime of deliberate homicide and instead imposed a 100-year prison sentence. The Montana Supreme Court reversed this conviction and sentence. State v. Fitzpatrick, 569 P.2d 383 (Mont. 1977). At the retrial, the State did not present any additional factors in aggravation or any evidence disputing the existence of mitigating circumstances presented at the first trial. Nevertheless, the trial court sentenced Mr. Fitzpatrick to death for the crime of deliberate homicide.

The Court of Appeals below held that the acquittal of the death sentence for deliberate homicide in the first trial precluded a death sentence upon retrial. In doing so, the court relied on well-established double jeopardy rules and, in particular, this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981).

Petitioner argues that Bullington constituted a new rule of criminal procedure and thus cannot be applied to any case final at the time Bullington was announced. Petition 18 (citing Teague v. Lane, 489 U.S. ___, 109 S. Ct. 1060 (1989)). Although the parameters of the Court's recent Teague decision are yet undefined, this case presents a poor opportunity to clarify them,

for several reasons.

First, the double jeopardy issue here presents no real controversy, unless the Court were to grant certiorari and reverse the Court of Appeals' unanimous decision on the ineffective assistance of counsel issue. As we have demonstrated above, there is no reason to do so.

Second, petitioner's failure to raise this theory of nonretroactivity in either the District Court or the Court of Appeals should preclude granting the writ of certiorari to examine it. As Justice Blackmun noted in Zant v. Moore, 489 U.S. ___, 109 S. Ct. 1518, 1519 (1989) (Blackmun, J., dissenting), when nonretroactivity is not raised as a defense to a claim of federal habeas corpus relief, the defense should be deemed waived.[8]

The general rule is that the failure to raise a defense in the district court -- either by answer or by motion -- acts as a waiver. See, e.g., 5 C. Wright & A. Miller, Federal Practice and Procedure § 1394, at 872 (1969) ("A defense that has not been raised in a pleading, by motion, or at trial normally will be considered waived and cannot be the subject of an amendment after judgment or be heard for the first time on appeal.") (footnote omitted). This principle is all the more applicable in cases, such as this, in which a state with its significantly greater resources can withhold defenses until later stages of litigation and appeal in the hopes of wearing down a habeas corpus petitioner or finding a sympathetic forum.

There is no reason ordinary waiver rules should not be

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[8] Petitioner obviously does not argue that respondent is requesting the creation of a "new" rule of double jeopardy, as Bullington was decided in 1981. Thus, unlike the situation in Teague, petitioner here knew of Bullington and should have raised any nonretroactivity defense in April 1984 when it filed its answer to respondent's petition for a writ of habeas corpus -- or at least in the Court of Appeals, where this case was pending when Teague was decided.

applicable when the defense is nonretroactivity of a particular claim. In large measure, the doctrine of nonretroactivity was designed to protect against undue federal interference with state functions. See, e.g., Teague v. Lane, 109 S. Ct. at 1073-75. In similar situations, when the state fails to raise such comity concerns as a defense, a federal court retains the authority to grant habeas relief. Granberry v. Greer, 107 S. Ct. 1671 (1987). The failure of a state to raise a defense based on comity principles should be treated as a waiver of the defense. See Engle v. Isaac, 456 U.S. 107, 124 n.26 (1982) (dictum).

Third, to apply Teague in this case would be to engage in precisely the same sort of selective application of new rules that Teague condemned. As the plurality opinion in Teague recognizes, "'selective application of new rules violates the principle of treating similarly situated defendants the same.'" 109 S. Ct. at 1072 (quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987)). It should not matter whether that selective application occurs on direct appeal or in post-conviction proceedings. Indeed, the central premise of Teague, which the Teague plurality expressly predicated on Griffith v. Kentucky, 479 U.S. 314 (1987), and Griffith's endorsement of Justice Harlan's view in Desist v. United States, 394 U.S. 244 (1969), and Mackey v. United States, 401 U.S. 667 (1971), see Teague, 109 S. Ct. at 1072-73, is that the very "nature of judicial review . . . precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule." Griffith, 479 U.S. at 323, quoting Mackey, 401 U.S. at 679 (separate opinion of Harlan, J.).

It could not be squared with this principle to deny respondent the relief awarded to Bullington simply because this

Court decided to grant Bullington's petition for certiorari and to deny Bernard Fitzpatrick's petition on the same day, although each challenged the imposition of the death penalty after a successful appeal of a prison sentence.[9] The Court might have well granted respondent's petition and denied Bullington's, or granted them both. Why the Court did not is a product of the considerations governing certiorari jurisdiction -- considerations which, as the Court has repeated stated, have nothing to do with the merits of cases. Such a decision, responding to nothing more than the "practical . . . [reality that the Court] cannot hear each case pending on direct review," Griffith, 479 U.S. at 323, cannot rationally be given the effect of subjecting respondent to a different constitutional regime than Mr. Bullington, his exactly contemporary certiorari petitioner, if similarly situated defendants are to be treated the same.

Fourth, for similar reasons, Teague would not bar relief because the principles applied in Bullington did not "break[] new ground or impose[] a new obligation" on the State of Montana. Teague, 109 S. Ct. at 1070. Rather than create a new rule or place a new obligation on the States, Bullington simply applied established double jeopardy principles to the capital sentencing context. The Bullington holding rested on principle that "an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." Arizona v. Rumsey, 467 U.S. 203, 211 (1984). In doing so, the

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[9] On May 21, 1980, respondent filed a Petition for a Writ of Certiorari seeking review of the Montana Supreme Court's decision affirming this death sentence. That petition specifically raised whether the imposition of the death sentence following the original sentence of 100 years imprisonment violated North Carolina v. Pearce, 395 U.S. 711, 725 (1969). On October 6, 1980, this Court denied respondent's petition. Fitzpatrick v. Montana, 449 U.S. 891 (1980). That same day, this Court granted certiorari in Bullington v. Missouri, 449 U.S. 819 (1980).

Court in Bullington explicitly relied on a long series of cases beginning at least as early as Green v. United States, 355 U.S. 184, 190 (1957), in which the Court held that the Double Jeopardy Clause bars retrial on greater charge following reversal on appeal because defendant already had been "forced to run the gantlet once on that charge."[10] This reasoning was acknowledged in North Carolina v. Pearce, 395 U.S. 711 (1969), where the Court recognized that double jeopardy principles do not normally bar the imposition of a greater sentence following a retrial, though an increased sentence must be based on objective conduct of the defendant occurring after the original proceeding. Id. at 717.

Finally, the double jeopardy issue this case presents is one which would fall clearly within Teague's exception for legal principles that place "'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe'" or "requires observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Teague, 109 S. Ct. at 1073 (quoting Mackey, 401 U.S. at 693 (separate opinion of Harlan, J.), quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)). As the Court recently made clear in Penry v. Lynaugh, 57 U.S.L.W. 4958, 4965 (U.S., June 26, 1989), Teague's first exception "cover[s] not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."

The operation of the Fifth Amendment's Double Jeopardy Clause in respondent's situation more closely resembles a rule

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[10] The Bullington Court's explicit recognition that it was not creating a new rule of law is instructive: the majority said directly that it was "refrain[ing] from extending the reasoning of Stroud v. United States, 251 U.S. 15 (1919), to this very different situation." 451 U.S. at 446.

placing "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" than it resembles an ordinary rule of criminal procedures. Just as the Speech and Debate Clause, art. I, § 6, cl. 1, for example, gives an individual the right not to be subjected to criminal prosecution for certain conduct, see Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-03 (1975), the Double Jeopardy Clause gives an individual the right not to be subjected to a capital prosecution after the punishment of death has once been rejected by a sentencer. Bullington v. Missouri. In both situations, the constitutional rule goes to whether the defendant can be tried at all under the circumstances, not merely to the procedures to be used for trying him.

This fundamental difference between the prohibitions of the Double Jeopardy Clause and most other criminal-procedure guarantees[11] is no novelty of Twentieth Century constitutional jurisprudence. For centuries, the prohibition against double jeopardy has been viewed as going to the jurisdiction of the criminal court. For this reason, habeas corpus relief was available for Double Jeopardy Clause claims at a time when habeas was strictly limited to jurisdictional matters, long before the expansion of the scope of federal habeas to nonjurisdictional constitutional claims or the expansion of the Due Process Clause

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[11] Pretrial rulings on double jeopardy claims are interlocutorily appealable, e.g., Bullington v. Missouri, (as are Speech and Debate Clause claims, see Helstoski v. Meanor, 442 U.S. 500 (1979)), whereas pretrial rulings on ordinary criminal procedure issues are not, see, e.g., United States v. MacDonald, 435 U.S. 850 (1978). Moreover, "a plea of guilty to a charge does not waive a claim that -- judged on its face -- the charge is one which the State may not constitutionally prosecute" consistently with the Double Jeopardy Clause, Menna v. New York, 423 U.S. 61, 63 n.2 (1975) (per curium); see United States v. Broce, 488 U.S. ___, 109 S. Ct. 757, 765-76 (1989), although a plea of guilty waives ordinary criminal-procedure claims, see, e.g., McMann v. Richardson, 397 U.S. 759 (1970)

by incorporation of the Bill of Rights. See, e.g., In re Neilson, 131 U.S. 176, 182-85 (1888) (double jeopardy claim entitled to habeas corpus relief); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874) (same).

This is of particular significance in light of Teague's determination that the "'relevant frame of reference . . . [for retroactivity decisions] is not the purpose of the new rule whose benefit the (defendant) seeks, but instead the purposes for which the writ of habeas corpus is made available.'" 109 S. Ct. at 1072 (quoting Mackey, 401 U.S. at 682 (separate opinion of Harlan, J.)). The reason for the maxim that "habeas corpus will not do service for an appeal" -- and the reason for Teague's retroactivity rules -- was to preserve the finality of criminal judgments. Yet Double Jeopardy Clause claims were an acknowledged exception to the maxim and they cannot be logically less of an exception to Teague's general rule of nonretroactivity of ordinary criminal-procedure claims.

Teague also recognized that nonretroactivity principles would not apply to "procedures that . . . are 'implicit in the concept of ordered liberty,'" 109 S. Ct. at 1073, particularly those whose purpose was to enhance accuracy in the criminal justice process would fall within the exception. Id. at 1076-77. The protection against double jeopardy qualifies as such a procedure:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may found guilty.

Green, 355 U.S. at 187-88; see also Crist v. Bretz, 437 U.S. 28, 35 (1978). As the Court recognized in Bullington, the Double Jeopardy Clause operates to ensure accuracy in death penalty

sentencing context: "The 'unacceptably high risk that the (prosecution), with its superior resources, would wear down a defendant,' thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." 451 U.S. at 445-46 (quoting United States v. Francesco, 449 U.S. 117, 130 (1980)).

For all these reasons, petitioner's last ditch resort to Teague is unavailing, either to establish error in the Court of Appeals' judgment,[12] or to create grounds for this Court's review.

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[12] Petitioner's argument that Arizona v. Rumsey does not control here because Montana's death sentencing scheme differs from Arizona's in a few trivial respects is simply frivolous. The niceties of the applicable evidentiary rules, and the length of potential sentences of imprisonment had nothing to do with the Court's judgment in Rumsey. The Court in Rumsey made it crystal clear that the touchstone of Double Jeopardy law in this area is "an acquittal on the merits of the central issue in the proceeding -- whether death was the appropriate punishment for respondent's offense." 467 U.S. at 211.

Petitioner's last point is similarly directly controlled by Rumsey. Even if it were true -- as the second sentencing judge assumed, but the first did not say -- that the original prison sentence resulted from "misgivings about the death penalty statute then in effect," Petition 21, "[r]eliance on an error of law . . . does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits." 476 U.S. at 211.

CONCLUSION

For all these reasons, the petition for certiorari to review the unanimous judgment of the Court of Appeals should be denied.

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August 3, 1989

APPENDIX

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That was postponed for some time, then after that hearing was held the case was remanded almost six months, or very close to six months, after it had been initially decided, because of the delay. Or I say six months. It wasn't that long. About three and a half months after it was decided. And I think it came down in the fall. November, I believe. And then I was appointed shortly after that, after I had withdrawn as Mr. Bad Horse's attorney.

Q Now, you indicated that you thought you met once or possibly more than once around that Christmastime. When you first met with Mr. Fitzpatrick at that point, did you discuss with him any possibility of a conflict of interest in your representation between him and Mr. Paul Bad Horse?

A No longer representing Mr. Bad Horse, there was no conflict. There never had been before.

Q So you didn't discuss that with him?

A No, sir.

Q Do you recall what you did discuss at the first meeting? I know it's a long time ago.

A Well, to be frank with you, we renewed our acquaintanceship for a brief time, sat there and visited about other things. I told him I had talked to Mr. Nelson, knew pretty much what his position was, asked him if this wasn't true and this wasn't true. Fitz said he had a lot to go over with me, and a great deal to go over with me, and

crime? In other words, prior to April 5th, 1975, did you know Paul Bad Horse, Jr.?

A. Well, it sounds strange but I knew Paul Bad Horse, Jr. I knew Mr. Holliday. Probably Mr. Holliday less than Mr. Bad Horse or Mr. Radi or Mr. Bushman. I knew all of them. Personally.

Q. How long had you known Mr. Bad Horse?

A. Mr. Bad Horse, probably a year and a half, two years.

Q. How long had you known Mr. Holliday?

A. Well, Mr. Holliday I had known over the years, but, as I stated, I had no real association with Mr. Holliday. I had known Mr. Holliday maybe -- His father was a minister here in Billings, and his mother, I have even known them -- well, since he was a boy.

Q. You were aware of some of his family circumstances, then.

A. Well, I had known his background as a boy.

Q. Did you know any of Mr. Bad Horse's background as a boy?

A. Yes. I had learned it in about the two or three years, or thereabouts, that I had known Mr. Bad Horse.

Q. How about Mr. Radi? Had you ever met Mr. Radi?

A. I had met Mr. Radi as a prosecutor and I had met Mr. Radi after I had entered private practice, so I did know

maybe?

MR. FORD: Objection, Your Honor. I think this is getting pretty far afield.

THE COURT: Overruled.

A I'll answer it this way. I don't know whether it's unique to this area. I don't know that perhaps -- I move in a lot of different circles and as a consequence I know a lot of people. And I know I am bragging when I'm saying that. I'm acquainted with their background and know them. I'm not sure every lawyer in Billings knows all the people, everybody, and all the people involved in the case. In this particular case I did. I can give you history and background of things. For instance, Paul Bad Horse was a national middle weight boxing champion. I follow boxing. I like boxing. As a consequence, I knew this fact about him. Paul Bad Horse is related to Robert Yellowtail for whom Yellowtail Dam is named. He's a grandson, if I'm not mistaken, of Mr. Yellowtail. I had known Paul by playing cards with him, talking with him, knew his nickname. Didn't know how he had gotten his nickname so I had asked him one time how he had acquired that nickname, Small Change. I had talked with others regarding him, people who travel in the type of circles that Mr. Bad Horse did.

I knew Mr. Bushman because Mr. Bushman had first come to Billings here to work as a bricklayer on the

CERTIFICATE OF SERVICE

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within-entitled cause; my business address is 1663 Mission Street, Suite 460, San Francisco, California 94103. On August 3, 1989, I served the attached BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS in said cause by placing one true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Washington, D.C., addressed as follows:

Kathy Seeley
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1401

I declare under penalty of perjury that the foregoing is true and correct. Executed this third day of August 1989, at Washington, D.C..

Michael Laurence

Michael Laurence

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